No. 85556-1

SUPREME COURT
OF THE STATE OF WASHINGTON

TESORO REFINING AND MARKETING COMPANY,

Respondent

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,

Petitioner

ON PETITION FOR REVIEW FROM DIVISION II
OF THE COURT OF APPEALS

SUPPLEMENTAL BRIEF OF RESPONDENT TESORO REFINING AND MARKETING COMPANY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington State Cases **Page(s)**

Page(s)

Federal Cases

Page(s)

Other Cases

Constitutional Provisions

Statutes

Page(s)

Regulations

Other Authorities

I. INTRODUCTION

This case presents two issues.

The first concerns a straightforward exercise in statutory interpretation. Prior to May 14, 2009, RCW 82.04.433(1) allowed a deduction from the measure of the business and occupation (B&O) tax imposed by RCW 82.04.220 for "amounts derived from sales of fuel for consumption outside the territorial waters of the United States, by vessels used primarily in foreign commerce." The Court of Appeals ruled that the plain language of the statute entitled "a refinery to a deduction of amounts derived from sales of qualifying products against its manufacturing B&O taxes." *Tesoro Refining and Marketing Company v. Dep't of Revenue*, 159 Wn. App. 104, 107, 246 P.3d 211 (2010). The Department of Revenue (DOR) contended (and still contends) that the deduction was limited to only the selling (wholesale or retail) B&O taxes. *Id.* at 111. The court rejected this argument, ruling that "the plain language of the statute does not restrict the deduction to exclude manufacturers and manufacturing B&O taxes" and "that former RCW 82.04.433 unambiguously allowed a company that both manufactured and sold bunker fuel to take a tax deduction for amounts derived from those sales." *Id.*

In making this ruling, the Court of Appeals employed the standard rules of statutory interpretation, most notably, the rule that a statute clear on its face must have its meaning derived from the language of the statute alone. *Tesoro*, 159 Wn. App. at 111-12 (citing *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006)). Rejecting the urging of DOR to

limit the deduction in former RCW 82.04.433 to wholesaling and retailing taxes, the Court of Appeals held:

> We do not " 'add language to an unambiguous statute even if [we] believe[] the Legislature intended something else but did not adequately express it.' " *Cerrillo*, 158 Wn.2d at 201 (quoting *Kilian* [*v. Atkinson*], 147 Wn.2d [16,] 20, 50 P.3d 638 [(2002)]). DOR's argument that this court should add the words "wholesale and retail B&O tax" into former RCW 82.04.433 goes "too far." *Homestreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 454, 210 P.3d 297 (2009) (DOR went "too far" when it argued that the court should determine that a statute distinguished between different types of interest revenue depending on the purpose of the interest when the statute required only "interest" to be received).

Tesoro, 159 Wn. App. at 113-14.[1]

The second issue is retroactivity. Former RCW 82.04.433 was enacted in 1985. Laws of 1985, ch. 471, § 16. This statute remained in its original form for 24 years and was not amended until May 14, 2009, when the Governor signed Senate Bill 6096 into law. Laws of 2009, ch. 494. This amendment was effective immediately (*id.* § 6) and included a retroactivity clause ("[T]his act applies both prospectively and retroactively") (*id.* § 4). Because former RCW 82.04.433 had never been amended, the effect of this retroactivity provision was to have the amendment "reach back 24 years" (although DOR says the amendment was merely to "'clarify' the 1985 statute"). *Tesoro*, 159 Wn. App. at 116.

[1] DOR said this reasoning "is unprecedented and inconsistent with *every* Washington appellate decision construing a B&O tax deduction provision since enactment of the Revenue Act of 1935." DOR Petition at 7 (emphasis added). DOR also stated "the Court of Appeals decision conflicts in principle with *dozens* of decisions by this Court and the Court of Appeals." *Id.* (emphasis added). DOR has yet to cite one of these dozens of decisions, or explain exactly how the Court of Appeals got so sidewise with those decisions.

The Court of Appeals ruled that "the 24-year retroactivity clause violates due process." *Id.* The court relied on a prior decision of this Court, in which "a four-year tax retroactivity period" was found to have "exceeded 'limited or permissible retroactivity.'" *Tesoro* at 119 (quoting *State v. Pac. Tel. & Tel. Co.*, 9 Wn.2d 11, 17, 113 P.2d 542 (1941)). Thus, the Court of Appeals followed this Court's *Pacific Tel. & Tel.* jurisprudence -- a decision "on the books" for 70 years -- to strike down the 24 year retroactivity period at issue in this case.

DOR would have this Court believe that the Court of Appeals' retroactivity decision has "national ramifications" because it somehow conflicts with the United States Supreme Court's decision in *United States v. Carlton*, 512 U.S. 26, 114 S. Ct. 2018, 129 L.Ed.2d 22 (1994). DOR Pet. at 18. According to DOR, the court's opinion is so wrong on the retroactivity issue that this Court must "reestablish the proper application of *Carlton* in Washington." DOR Pet. at 18. In fact, this Court need not even address *Carlton* because of the clear, independent line of authority for limited retroactively in this state that has its genesis in *Pacific Tel. & Tel.* And, even if this Court were to consider *Carlton*, it will find that the Court of Appeals correctly dealt with that case, when it called "DOR's reliance on *Carlton* . . . misguided" since the "facts of *Carlton* are readily distinguishable from the instant case." *Tesoro*, 159 Wn. App. at 117-18. The Congressional amendment at issue in *Carlton* was retroactive for a period of approximately 14 months, whereas the retroactive amendment here was enacted in 2009 and went back 24 years to 1985. Thus, *Carlton*

is indeed clearly inapposite and offers no support to DOR's attempt to save the retroactivity provision at issue.

The Court of Appeals should be affirmed in all respects.

II. SUPPLEMENTAL ARGUMENT

A. The Court of Appeals Correctly Interpreted Former RCW 82.04.433. Under the Plain Language of This Statute, Tesoro is Entitled to Deduct "Amounts Derived" From Sales of Bunker Fuel Against Its Manufacturing B&O Tax Liability.

Former RCW 82.04.433(1) stated in its entirety as follows: "In computing tax there may be deducted from the measure of tax amounts derived from sales of fuel for consumption outside the territorial waters of the United States, by vessels used primarily in foreign commerce." The plain language of this statute allows a deduction from the measure of any of the various B&O taxes imposed under Chapter 82.04 RCW, including the manufacturing tax imposed by RCW 82.04.240. The ruling by the Court of Appeals was a "plain meaning" reading of the "[i]n computing tax" language that introduces the deduction statute, and which the court properly held "unambiguously refers to, at the very least, all B&O taxes." *Tesoro*, 159 Wn. App. at 113 (citing *Agrilink Foods, Inc. v. Dep't of Revenue*, 153 Wn.2d 392, 397, 103 P.3d 1226 (2005)).

Under the current B&O tax scheme, Tesoro pays both a manufacturing tax and a wholesaling or retailing tax when it manufactures and sells products. Tesoro is then allowed a credit under RCW 82.04.440 (known as the Multiple Activities Tax Credit or MATC) against the "selling" taxes (wholesaling and retailing) "for any . . . manufacturing taxes paid with respect to the manufacturing of products so sold in this

state" (RCW 82.04.440(2)(a)) in calculating its B&O tax. The net effect of the credit allows Tesoro to pay the manufacturing tax only.[2] DOR claims the deduction was intended to be limited to taxpayers that pay wholesaling and retailing B&O taxes. *See Tesoro, supra*, at 113. But the introduction to former RCW 82.04.433(1) did not state the deduction applied when "computing *wholesaling or retailing* tax"; it said "[i]n computing tax," unambiguously referring to all B&O taxes.

That the 1985 statute was not limited to wholesaling and retailing taxes is underscored by the language added in the 2009 amendment. At that time the Legislature changed the statute to read, "[i]n computing tax there may be deducted from the measure of tax *imposed under RCW 82.04.250 and 82.04.270* amounts derived . . ." (new language emphasized). Laws of 2009, ch. 494, § 2. If the former statute limited the deduction to the wholesaling and retailing B&O taxes as claimed by DOR, there should never have been a need for the 2009 amendment in the first place, which rewrote the statute so that it now said what the DOR claims it has always said.[3] And as the Court of Appeals correctly ruled, while the

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[2] The Court of Appeals correctly summarized the history of RCW 82.04.440 and how the current credit scheme came about. *See Tesoro*, 159 Wn. App. at 108, n.1. For a discussion of the impact the enactment of the 1987 MATC had on former RCW 82.04.433, *see* Tesoro's Opening Brief at 45-46, n.32.

[3] Before the Court of Appeals Tesoro argued that the 2009 amendment was invalid not only retroactively, but prospectively as well, "because [Senate Bill 6096] did not receive a two-thirds supermajority vote of both houses of the legislature required for passage of a bill to raise taxes." *Tesoro*, 159 Wn. App. at 120 (citing former RCW 43.135.035 (2005)). Because Tesoro's refund claim covered the period December 1, 1999 through December 31, 2007, periods after the latter date were not before the court. *Id.* The Court of Appeals therefore concluded that "whether the 2009 amendment is unconstitutional for

(footnote continued on next page)

Legislature undoubtedly has the power to add language to *its* enactments, the courts may not do that. *See Tesoro*, 159 Wn. App at 113 (citing and quoting *Cerrillo*, 158 Wn.2d at 201, quoting *Kilian*, 147 Wn.2d at 20). ("We do not 'add language to an unambiguous statute . . .'").

The second major argument DOR has advanced in support of its interpretation of former RCW 82.04.433 relies on its own regulations, WAC 458-20-175 (Rule 175) and WAC 458-20-193C (Rule 193C), which were amended shortly after the statute was enacted in 1985 to add the following identical statement: "[O]n July 1, 1985, a statutory business and occupation tax deduction became effective for sales of fuel for consumption outside the territorial waters of the United States by vessels used primarily in foreign commerce." DOR believes this statement interprets the deduction to only apply to wholesaling and retailing B&O taxes. *See* DOR Pet. at 3. But a plain reading of this sentence does not show any intent to interpret or limit the deduction to selling B&O taxes, but only to make a statement of historical fact. And, while DOR does have authority to make interpretive rules (*Ass'n of Wash. Bus. v. Dep't of Revenue*, 155 Wn.2d 430, 445, 120 P.3d 46 (2005)), the sentence added to Rules 175 and 193C was not an interpretive statement.[4]

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failure to comply with former RCW 43.135.035 is not ripe for review [footnote omitted]." *Id.* Thus, the legality of the prospective effect of the 2009 amendments will be left to another day.

[4] Even if the sentence could be construed as interpretive, interpretive rules are not binding on the courts. *Ass'n of Wash. Bus.*, 155 Wn.2d at 447. As the Court of Appeals correctly stated: "Because the statutory language is clear, a department regulation cannot alter the plain language to resolve an ambiguity that does not exist on the face of the statute." *Tesoro*, 159 Wn. App. at 113.

While the amendments to Rules 175 and 193C were not interpretative, in no less than three determinations issued to taxpayers in the same position as Tesoro, DOR ruled that manufacturers *were* entitled to deduct qualifying sales of bunker fuel from the measure of their B&O tax liability. *See* CP 221-225 (determination issued to U.S. Oil & Refining Co. in 1993); CP 294 (determination issued to Sound Refining, Inc. in 1988); CP 295 (determination issued to Pacific Northern Oil Corporation in 1993).[5] As the Court of Appeals recognized:

> . . . DOR's contention conflicts with its own previous determinations that it could not deny a manufacturer the deduction by artificially limiting the statute's applicability to only wholesalers and retailers.

Tesoro, 159 Wn. App. at 114. *AWB*, issue at 447.[6]

In *Silverstreak, Inc. v. Dep't of Labor & Industries*, 159 Wn.2d 868, 154 P.3d 891 (2007), this Court held that Labor & Industries was estopped from repudiating its own interpretative policy memorandum. The three determinations issued to other taxpayers in this case were equivalent to the policy memorandum in *Silverstreak*, as the

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[5] The statement in Rules 175 and 193C about which DOR makes so much in this case was present at the time each of the determinations was issued, yet not one of the administrative law judges interpreted that sentence the way DOR claims the rules have always read.

[6] The Court of Appeals found further evidence of DOR's interpretation in the fiscal note submitted by DOR itself in support of the 2009 amendment. There, DOR predicted that without the legislation "'a potential *ongoing* estimated revenue loss of $4.75 million in the biennium ending in Fiscal Year 2011.'" *Tesoro*, 159 Wn. App. at 114 (citing Agency Fiscal Note to S.B. 6096, at 2, 61st Leg., Reg. Sess. (Wash. 2009) (prepared by DOR) (court's added emphasis). The "ongoing" revenue losses no doubt included revenues from the taxpayers (refiners) DOR had previously advised to take the deduction against their manufacturing B&O tax liability, beginning 21 years earlier.

determinations established DOR's interpretation and policy on who was entitled to take the deduction. As this Court held, "[i]t is self-evidently unfair to permit the Department to adopt and publicly distribute an interpretive policy memorandum and later deny the memorandum's plain reading after contractors have relied upon it to their detriment." *Silverstreak*, 159 Wn.2d at 889.[7] Here, DOR suddenly and unilaterally reinterpreted an unchanged and unambiguous statute to Tesoro's detriment. This Court should hold that DOR is not free to say that the statute meant one thing one day and then the next day to say that the statute meant something entirely different.

Contrary to the DOR's claim in its Petition for Review, there is *nothing* in the Court of Appeals' decision that is "unprecedented" or "inconsistent" with any "Washington appellate decision construing a B&O tax deduction provision since enactment of the Revenue Act of 1935"; nor does "the Court of Appeals decision conflict in principle with dozens of decisions by this Court [or] the Court of Appeals[.]" DOR Pet. at 7. In

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[7] In a concurring opinion on the question of agency interpretation filed in *Stevens v. Brinks Home Security, Inc.*, 162 Wn.2d 42, 169 P.3d 473 (2007), Chief Justice Madsen, joined by Justice Fairhurst, observed:

> An agency policy can be useful in determining the meaning of statutory terms. *See generally, e.g., Stahl v. Delicor of Puget Sound, Inc.*, 148 Wash.2d 876, 886-87, 64 P.3d 10 (2003). They need not be promulgated with the formality of rule making but must represent a uniformly applied interpretation. *See generally Cowiche Canyon Conservancy v. Bosley*, 118 Wash.2d 801, 815, 828 P.2d 549 (1992).

Stevens, 162 Wn.2d at 54 (Madsen, C.J., concurring, joined by Fairhurst, J.). That is precisely what the Court contronts here -- a uniformly-applied DOR policy on who is entitled to the bunker fuel deduction, reflected in three determinations issued to taxpayers similarly situated to Tesoro.

fact, the Court of Appeals was careful to adhere to this Court's decisions on statutory interpretation. Most notably, the court followed this Court's recent decision in *HomeStreet, Inc. v. Department of Revenue*, 166 Wn.2d 444, 210 P.3d 297 (2009), which interpreted operative language in another B&O tax deduction statute (RCW 82.04.4292) *identical* to the operative language in former RCW 82.04.433(1). The Court of Appeals found *HomeStreet* controlling:

> Former RCW 82.04.433 . . . provides a deduction for the "amounts derived from sales" of qualifying products from the "measure of tax" without specifying *which* measure of tax it may be applied against. The term "derived from" is not defined in the B&O tax statutes, but our Supreme Court recently defined the term as " 'to take or receive esp. from a source.' " *HomeStreet*, 166 Wn.2d at 453 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 608 (2002)). Here, Tesoro has proved by Rule 175 certificates and, it is undisputed, the amount at issue was "received" from sales to vessels for use primarily in foreign commerce as required under former RCW 82.04.433. That a different methodology is employed to calculate Tesoro's initial manufacturing B&O tax liability does not affect this analysis.
>
> Accordingly, we hold that the language of former RCW 82.04.433 is unambiguous.

Tesoro, *supra* at 115 (emphasis by the Court).

Remarkably, DOR ignored *HomeStreet* in its briefing to the Court of Appeals, and DOR ignored that authority again in its Petition to this Court when it charged the Court of Appeals with having ignored "decades" of precedent. In fact, it is the DOR whose position flies in the face of precedent -- clear, unambiguous precedent -- and Tesoro urges this Court to affirm on that basis.

B. The Court of Appeals Correctly Held That the 2009 Amendment's 24 Year Retroactivity Clause Violates Fundamental Rules of Fairness, as Laid Down by this Court's Decisions.

1. This Court Can Decide the Retroactivity Issue On Independent State Law Grounds, and Uphold the Court of Appeals based on this Court's Precedents.

In *Michigan v. Long*, 463 U.S. 1032, 1041, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983), the Supreme Court reaffirmed the right of state courts to rest their decisions "on adequate and independent state grounds." Principles of comity and deference run both ways, and a state court should avoid resting its decision on federal constitutional grounds if the court can avoid it.[8] *Michigan v. Long* encourages these principles, by recognizing the right of state courts to not opine on federal constitutional law unless the court absolutely must.

DOR wants this Court to jump into the *Carlton* "thicket." *See* Answer at 4. In fact, this Court need not address *Carlton*. Admittedly, *Carlton* is the subject of intense debate over the proper boundaries of retroactive statutes, including petitions to the U.S. Supreme Court on a fairly regular basis. Admittedly also, the courts in the various states are divided on the proper application of *Carlton*. Fortunately, this Court can resolve *this* case on state law grounds to avoid the federal due process issue involved in *Carlton*, by basing its decision on a clear, independent

[8] In effect, this is a corollary of the rule that a court should try to decide a case on nonconstitutional grounds if it can. *See HJS Dev., Inc. v. Pierce County*, 148 Wn.2d 451, 469 n.74, 61 P.3d 1141 (2003) (citing *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 752, 49 P.3d 867 (2002); *State v. Speaks*, 119 Wn.2d 204, 207, 829 P.2d 1096 (1992)) ("It is well established that if a case can be decided on nonconstitutional grounds, an appellate court should decline to consider the constitutional issues").

line of authority, which begins with this Court's decision in *Pacific Tel. & Tel.*

Pacific Tel. & Tel. arose out of problems with statutes enacted in 1935 and 1937, which attempted to impose a use tax on certain tangible personal property. These statutes were found to not apply to property purchased outside this state. The Legislature finally enacted a statute in 1939 which properly imposed the tax, but also provided "for the collection of the tax as far back as April 30, 1935." *Pacific Tel. & Tel.*, 9 Wn.2d at 17. This Court acknowledged that a "retroactive statute can be sustained" if it applies "'to prior but recent transactions.'" *Id.* (citing *Welch v. Henry*, 223 Wis. 319, 271 N.W. 68 (1937); *Welch v. Henry*, 305 U.S. 134, 59 S. Ct. 121, 83 L. Ed. 87 (*per curiam*) (1938)).[9] In deciding the four-year retroactivity period at issue in *Pacific Tel. & Tel.* this Court held:

> The statute involved in those cases provided for a much shorter period of retroactivity than does the statute of this state, and the opinion in each case recognized that the statute approached or reached the "limited or permissible retroactivity"; it did not exceed it. The retroactive feature of the statute here under consideration cannot be sustained.

Pacific Tel. & Tel., 9 Wn.2d at 17.

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[9] In *Welch* the taxpayer alleged that the Wisconsin Legislature could make income tax provisions "retroactive during the year of enactment and during the preceding year where the tax upon such preceding year has not been determined and paid, but that it is beyond the power of the Legislature to tax dividends received in 1933 by a statute passed in 1935." 271 N.W. at 71. The Wisconsin Supreme Court rejected this contention, finding no constitutional impairment if the tax "applies to the year in which the law is enacted or if it applies to prior but recent transactions." *Id;* at 72. The court concluded that the Wisconsin tax enacted in 1935 and reaching back to 1933 was valid although it "may approach or reach the limit of permissible retroactivity, [but] it did not exceed it." *Welch, supra.*

Thus, this Court adopted a doctrine of limited retroactivity, which the Court of Appeals acknowledged and applied in this case. *Tesoro*, 159 Wn. App. at 119 (citing *Pacific Tel. & Tel.*, 9 Wn.2d at 17) ("We recognize that identifying and correcting significant fiscal losses is a legitimate legislative purpose. But we hold that it is not reasonable for the legislature to enact a retroactive amendment spanning 24 years in direct response to a taxpayer's refund lawsuit").[10] The Washington rule is a doctrine of fundamental fairness, under which this Court has looked with disfavor on attempts by the taxing authority to change the rules of the tax game, and precisely because the exercise of the power to tax is not a game. *See, e.g., Hansen Baking Co. v. Seattle*, 48 Wn.2d 737, 743, 296 P.2d 670 (1956) ("An administrative agency may not retroactively impeach its own general rules because of asserted errors of fact, judgment, or discretion on its own part"); *Group Health v. Dep't of Revenue*, 106 Wn.2d 391, 407, 722 P.2d 787 (1986) (a taxpayer is allowed to rely on a department prechange position until the taxpayer receives notification of reversal of position). There are few things more fundamental for taxpayers than knowing that the books can be closed on a tax year. This is especially important for businesses -- including small businesses as well as large corporations like Tesoro -- who need to be able to plan. As this Court said in *Hansen Baking Co*, "[i]f it were permissible for a taxing agency to

[10] While the Court of Appeals relied on *Pacific Tel. & Tel,* DOR ignored this case in its petition. To this day Tesoro does not know what DOR's position is on *Pacific Tel. & Tel.*, or the cases cited by *Pacific Tel. & Tel.* It is unclear what DOR could possibly say other than to ask this Court to overrule *Pacific Tel. & Tel.*

challenge, years later, [the]...rules promulgated by its own enforcement agency, taxpayers would never be able to close their books with assurance." 48 Wn.2d at 743-44.

The 2009 amendment to RCW 82.04.433 plainly cannot pass muster under this Court's fair treatment rule of limited retroactivity. Given this Court declared in *Pacific Tel. & Tel.* that a four year retroactive period went too far, one must ask what the 2009 Legislature was thinking when it approved a *twenty-four* year retroactive period. Further, the manner in which the 2009 amendment was enacted is nothing less than an exercise in absurdist fiction, with the Legislature and DOR together pretending that the 2009 Legislature when it enacted the amendment knew the intent of the Legislature in 1985.[11] This Court has a well-established

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[11] For a complete dissection of the purported "purpose" of the 2009 amendment and how the Legislature in that year could "divine" the intent of the 1985 Legislature, *see* Appellant's Opening Brief to the Court of Appeals at 42-47. As Chief Justice Hunter and Justice Finley aptly put the matter:

> An authentic interpretation by a subsequent session of the legislature is entitled to great weight. But subsequent legislative interpretation, like the initial legislation itself, normally may be given authoritative effect *only prospectively*. *See* J. Sutherland, 2 Statutory Construction § 3004 (3d ed. 1943). Traditionally and fundamentally the interpretation of the initial legislation remains a judicial function. In seeking the intent of the legislature, the judicial branch of government must ultimately be guided by the language used by those members of the legislature who passed the measure and not by an expression by a session, of different composition, which addressed the same subject 9 years later. *See* E. Freund, Legislative Regulation 178 (1932).
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> Determination of the meaning and legal effect of statutes enacted by the legislature, in an ultimate sense, is recognized traditionally as the function of the judicial branch. *After the fact, legislative authentication relative to previous enactments is, in my judgment, extremely dubious.*

Anderson v. Seattle, 78 Wn.2d 201, 205, 471 P.2d 87 (1970) (Hunter, C.J., concurring with Finley, J.) (emphasis added).

principle of limited retroactivity under Washington tax law, and there is no way that policy can be squared with what the Legislature did here.[12]

To be sure, taxpayers have to expect that, when a new tax is introduced or an old tax is amended, there must be a safe harbor period, of a year and perhaps two, during which retroactive adjustments are possible. But not *twenty-four* years later, which is what was done in this case. To win this case under state law DOR must persuade this Court to overrule *Pacific Tel. & Tel.* and repudiate its rule of limited retroactivity altogether, and there is absolutely no good reason for the Court to do so. This Court will have to allow the Legislature the power of effectively unlimited retroactivity, and there is no legitimate interest -- including the state fisc even in these tough economic times – that can justify allowing the legislature such authority.

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[12] There is some question in this Court's decisions about the degree to which some retroactivity is to be tolerated. In *Bates v. McLeod*, 11 Wn.2d 648, 657, 120 P.2d 472 (1941), the Court held that a new unemployment compensation law enacted on March 17, 1937, but made effective back to January 1, 1937, was unconstitutional "with respect to the period of January 1, 1937, to March 16, 1937." But in *Japan Line, Ltd. v. McCaffree*, 88 Wn.2d 93, 558 P.2d 211 (1977), where the question was whether a new leasehold excise tax law enacted on March 1, 1976, but retroactive to January 1, 1976, violated due process, this Court held that it did not. *Id.* at 96-98. *Bates* was distinguished on the basis that the new unemployment tax was "novel" at the time, whereas the new leasehold tax that was the subject in *Japan Line* "was enacted after a 6-year controversy over the best and most equitable manner of taxing benefits received by [private] lessees [of public property]" and while the form of the leasehold tax was "new, the subject matter had previously been taxed," therefore, the tax was not found to be "novel." *Id.* at 97-98. Moreover, in *Japan Line* this Court reiterated that it has "imposed narrow and specific limits on the Legislature's broad powers in regard to a retroactive tax." *Id.* at 96. Wherever the line may ultimately be drawn separating permissible from impermissible retroactivity periods, there is no question that the measure at issue here crossed that line into the forbidden zone.

2. If This Court Does Apply *Carlton*, It Should Hold That What the Legislature Did Here Violates Federal Due Process.

Carlton is a rule of federal due process.[13] *Carlton* arose out of a 1987 amendment to a federal estate tax statute that had been enacted in 1986. 512 U.S. at 27. The 1987 amendment was adopted by Congress as a curative measure to correct an unintended consequence of the 1986 law, which essentially allowed taxpayers to engage in transactions that would reduce their estate tax liability. *Id.* at 31-32. The Supreme Court ruled that "Congress' purpose in enacting the amendment was neither illegitimate nor arbitrary. Congress acted to correct what it reasonably viewed as a mistake in the original 1986 provision that would have created a significant and unanticipated revenue loss." *Id.* at 32. The Supreme

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[13] The Washington State Constitution states that, "No person shall be deprived of life, liberty, or property, without due process of law." Art. 1 Section 3. In *Pacific Tel. & Tel.* this Court did not state whether the rule of limited retroactivity applied in that case was grounded in due process requirements or some other legal principle. To the extent this court now concludes that the rule should be grounded in due process requirements, under the factors identified in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), the rule should be grounded in *state* due process requirements. This Court has "repeatedly ruled that the [United States] Supreme Court's interpretation does not control [its]...interpretation of the state constitution's due process clause." *State v. Bartholomew*, 101 Wn.2d 631, 639, 683 P.2d 1079 (1984). "[C]ontext matters when...determining whether to independently analyze the state due process clause[,]" *Bellevue School District v. E.S.*, ___ Wn.2d ___, ___ P.3d ___, 2011 WL 2278158, *7, ¶ 21 (2011), and here the context favors grounding the limited retroactivity rule in the independent requirements of state due process. First, preexisting state law (the rule of *Pacific Tel & Tel.* and its progeny) has been protective of taxpayers against expansive retroactivity claims. *See Gunwall*, 106 Wn.2d at 61-62 (fourth factor). Second, the structural differences between the federal and state constitutions favor an independent analysis. *See id.* at 62 (fifth factor); *see also E.S.*, at *8, ¶ 24 (the Court has consistently concluded that the fifth factor supports an independent analysis) (citation and quotation omitted). Third, state and local taxation has long been recognized as a matter of particular state and local concern, as demonstrated by federal statutory enactments such as the Tax Injunction Act, 28 U.S.C. § 1341. *See Gunwall*, 106 Wn.2d at 62 (sixth factor).

Court determined that, as long as the statutory amendment was rationally related to a legitimate legislative purpose, it would not violate due process. *Id.* at 35.

Here, the Court of Appeals found that the Legislature's purpose in enacting the 2009 amendment was both illegitimate and arbitrary. The "legislative history of the 2009 act shows the recent amendment was in direct response to Tesoro's refund request." *Tesoro*, 159 Wn. App. at 118. In *Carlton* the Supreme Court held that "Congress acted promptly and established a modest period of retroactivity." 512 U.S. at 32. Here, the Court of Appeals noted that the "legislature has had ample opportunity since 1985 to restrict [former RCW 82.04.433's] applicability to only retail and wholesale B&O tax" but did not. *Tesoro*, 159 Wn. App. at 118. The court went on to hold "[t]here is no colorable argument to suggest a legislative act creating a 24-year retroactive tax period is 'prompt[]' or establishes a 'modest period of retroactivity.'" *Id.* at 119 (citing *Carlton*, *supra*).

Carlton is not a stand-alone case; it is one of a series of United States Supreme Court decisions dealing with the ability of Congress to make changes in federal tax law operate retroactively.[14] As Justice O'Connor observed in her concurring opinion in *Carlton*, in these cases:

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[14] *See, e.g., United States v. Hemme*, 476 U.S. 558, 106 S.Ct. 2071, 90 L.Ed.2d 538 (1986); *United States v. Darusmont*, 449 U.S. 292, 101 S.Ct. 549, 66 L.Ed.2d 513 (1981); *Welch v. Henry*, 305 U.S. 134, 59 S.Ct. 121, 83 L.Ed. 87 (1938) (*per curiam*); *United States v. Hudson*, 299 U.S. 498, 57 S.Ct. 309, 81 L.Ed. 370 (1937); *Milliken v. United States*, 283 U.S. 15, 51 S.Ct. 324, 75 L.Ed. 809 (1931); *Cooper v. United States*, 280 U.S. 409, 50 S.Ct. 164, 74 L.Ed. 516 (1930), all cited in *Carlton*, 512 U.S. at 30.

> . . . "the Court has never intimated that Congress possesses unlimited power to 'readjust rights and burdens . . . and upset otherwise settled expectations.'" *Connolly v. Pension Benefit Guaranty Corporation*, 475 U.S. 211, 229, 106 S.Ct. 1018, 1028, 89 L.Ed.2d 166 (1986) (O'CONNOR, J., concurring) (brackets omitted), quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16, 96 S.Ct. 2882, 2893, 49 L.Ed.2d 752 (1976). The government interest in revising the tax laws must at some point give way to the taxpayer's interest in finality and repose. For example, a "wholly new tax" cannot be imposed retroactively, *United States v. Hemme*, 467 U.S. 558, 568, 106 S.Ct. 2071, 2077-2078, 90 L.Ed.2d 538 (1986), even though such a tax would surely serve to raise money. Because the tax consequences of commercial transactions are a relevant, and sometimes dispositive, consideration in a taxpayer's decisions regarding the use of his capital, it is arbitrary to tax transactions that were not subject to taxation at the time the taxpayer entered into them. See *Welch v. Henry*, *supra*, 305 U.S., at 147, 59 S.Ct., at 125-126.

Carlton, 512 U.S. at 37-38 (O'Connor, J., concurring).

The United States Supreme Court has *never* said that the requirements of federal due process, which apply to the states via the Fourteenth Amendment, can be met by approving retroactivity on the scale that is present in this case (24 years). Indeed, there is every reason to think that the Supreme Court would never approve such a period. As Justice O'Connor put the point in her concurring opinion in *Carlton*:

> In every case in which we have upheld a retroactive federal tax statute against due process challenge, however, the law applied retroactively for only a relatively short period prior to enactment. *See United State v. Hemme*, *supra*, 476 U.S., at 562, 106 S.Ct., at 2074-2075 (1 month); *United States v. Darusmont*, *supra*, 449 U.S., at 294-295, 101 S.Ct., at 550-551 (10 months); *United States v. Hudson*, 299 U.S. 498, 501, 57 S.Ct. 309, 310, 81 L.Ed. 370 (1937) (1 month). In *Welch v. Henry*, *supra*, the tax was enacted in 1935 to reach transactions completed in 1933; but we emphasized that the state legislature met only biannually and it made the revision "at the first opportunity after the tax year in which the income was received." 305 U.S., at 151, 59 S.Ct., at 127. A period of retroactivity longer than the year preceding the

> legislative session in which the law was enacted would raise, in my view, serious constitutional questions.

Carlton, 512 U.S. at 38 (O'Connor, J., concurring).[15]

What the Legislature did here conflicted with *Carlton* in numerous aspects. The 2009 amendment:

- was not supported by a legitimate legislative purpose
- was not furthered by rational means
- was not curative
- was illegitimate and arbitrary
- was not correcting a mistake; instead, it was overturning 24 years of DOR interpretations (i.e., the amendment *changed* the law)
- did not respond to an unanticipated revenue loss since the deduction had been taken by persons who both manufactured and sold bunker fuel since 1985 (in fact, the amendment was a tax increase because a deduction was taken away from taxpayers)

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[15] DOR claimed in its petition to this Court and previously to the Court of Appeals that "numerous federal and state courts in recent years have refused to strike down tax statutes or legislative tax rules with retroactive application periods longer than or comparable to the nine years at issue in this case." DOR Pet. at 13; *see* DOR Resp. Br. at 45. In each case, DOR provided a string cite of cases purportedly stating the proposition that courts have refused to strike down retroactive statutes and rules covering periods comparable to the period at issue in this case, *Id.* at 13, n.4; *id.* at 45, n.22. Tesoro submits that *none* of these cases have facts comparable to the facts present in this case. And, in each of the other cases the court found factors, such as the period of retroactivity bore "a rational relation to [the act's] underlying legislative purpose" to resolve an ambiguity in the original statute (*see Montana Rail Link, Inc. v. United States*, 76 F.3d 991, 994 (9th Cir., 1996) (retroactive statute upheld going back seven years) or a need for a prompt legislative response to an "unanticipated judicial interpretation" (*see King v. Campbell County*, 217 S.W.3d 862, 870 (Ky.Ct.App 2006) (legislation foreclosed refunds of certain fees up to 19 years), which supported upholding the retroactivity in question but which are *not* present in this case.

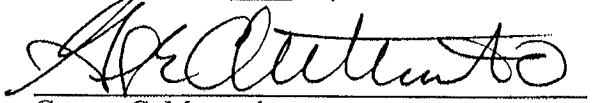
- is anything but modest and, not only is there a plausible contention, but it is an obvious fact that the Legislature, and at the Department's urging, acted with an improper motive in targeting Tesoro's refund claim.

However one parses it, the 2009 amendment cannot be reconciled with any rule of fairness, state or federal. It can only be upheld on the grounds that the Legislature has effectively unlimited retroactivity power, which is not the rule under either state or federal law.[16] Difficult economic circumstances cannot justify disregarding the taxpaying citizens' rights to fair treatment and due process in so egregious a fashion.

III. CONCLUSION

The Court of Appeals' decision should be affirmed.

RESPECTFULLY SUBMITTED this 27th day of June, 2011.



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[16] This case does not implicate any sort of taxing system that has built into it a structure of review and reconsideration. Tesoro is not saying that the Legislature could not draft a law that proceeds in one way for a period of time and then gives the Legislature an opportunity to reassess and, if the Legislature decides it wants to go in another direction, go backwards in time and correct the difference. While this may not be a very good way to write tax laws – because it creates uncertainty – nevertheless, if the Legislature chooses that course of action there is nothing about the Court's decision in this case that should in any way undermine that kind of choice.

DECLARATION OF SERVICE

I certify that I served a copy of the foregoing Supplemental Brief of Respondent Tesoro Refining and Marketing Company on the date set forth below via U.S. Mail, postage prepaid, on the Respondent's counsel of record, as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 27th day of June, 2011 at Seattle, Washington.

Patti Saiden

Patti Saiden